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IN THE

Supreme Court of the United States

United States Supreme Court No.....

Michigan State Supreme Court No. 43,479
Oakland County Circuit Court No. 21,917

HAZEL PARK NON-PARTISAN TAXPAYERS ASSOCIATION and JOHN G. CAMPBELL,
Plaintiffs and Appellants,
and
CITY OF PLEASANT RIDGE and CITY OF HUNTINGTON WOODS,
Cross-Plaintiffs and Appellants,

vs.

TOWNSHIP OF ROYAL OAK,
Defendant, Cross-Plaintiff and Appellee,

EDGAR B. WHITCOMB and CITY OF HIGHLAND PARK,
Intervening Cross-Defendants and Appellees,

CITY OF FERNDALE, CITY OF ROYAL OAK, CITY OF CLAWSON, CITY OF BERKLEY and CITY OF HAZEL PARK,
Defendants and Appellees

BRIEF OF APPELLANTS, HAZEL PARK NON-PARTISAN TAXPAYERS ASSOCIATION, JOHN G. CAMPBELL, CITY OF PLEASANT RIDGE AND CITY OF HUNTINGTON WOODS, IN OPPOSITION TO MOTIONS OF THE APPELLEES, TOWNSHIP OF ROYAL OAK, WHITCOMB AND CITY OF HIGHLAND PARK TO DISMISS THE APPEAL

OFFICIAL REPORT OF OPINION OF THE MICHIGAN SUPREME COURT IN THIS CASE WHEN HEARD BELOW

The official report of the opinion of the Michigan Supreme Court when heard below is reported in:

Hazel Park Non-Partisan Taxpayers Ass'n. v. Township of Royal Oak, 317 Mich. 607.

APPELLANTS' CONTENTION

Appellants Contend: On behalf of the Appeal by Hazel Park Non-Partisan Taxpayers association and John G. Campbell, representatives of taxpayers as a Class that:

1. An appeal will not be dismissed for defects in procedure which are not known to parties who are not represented by Counsel.

2. Assignments of Error on an appeal to an intermediary court are not necessary prerequisites to a subsequent appeal when the intermediary court fully passes upon the constitutional questions involved.

3. An appeal should be allowed to representative parties acting on behalf of a Class, in Class Suit litigation, wherever justice requires that the rights of such Class be protected by appeal.

4. Appeals in equity cases are heard *de novo* in the appellate court and decisions which affect parties jointly interested or having community of interest apply to and for the benefit of both the appealing and non-appealing parties.

Appellants contend: On behalf of the appeal by the Cities of Huntington Woods and Pleasant Ridge, that:

5. Municipalities being recognized by Michigan law as proper representatives in court proceedings for their taxpayers, are proper interested parties to appeal and raise constitutional questions on behalf of such taxpayers.

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FACTS

Taxpayers' Suit

This was a taxpayers' suit brought by the appellants, John G. Campbell and the Hazel Park Non-Partisan Taxpayers Association to enjoin the levying of taxes to pay special assessment bonds, which bore no general obligation credit *by assessing properties lying outside of the Special Assessment Districts.* Plaintiffs were taxpayers seeking relief under the decision of,

> *Risty v. Chicago R. I. Ry.*, 270 U. S. 378, 70 L. ed. 641

which held that it is a denial of due process of law to levy special assessment taxes against property *outside the district.*

Issues Raised by Plaintiffs' Bill of Complaint

Plaintiffs' Bill of Complaint as amended, stated in part;

> "V. That the defendant, Township of Royal Oak, its officers, agents, or employees be limited to collecting the amounts of the special assessments originally levied on the several parcels of property benefited.
>
> VI. That the defendants be enjoined from levying, or attempting to levy or collect any taxes to retire special assessment indebtedness on properties in the township not originally assessed for a benefit by virtue of said special assessment."
>
> Michigan Supreme Court Record, Page 10

and on the date of hearing the prayer for relief, was amended with leave of the court to include the following prayer:

"That this Court may decree that Act 58 of 1927, Act 26 of 1931 and Act 271 of 1937 are invalid and inoperative as to bonds issued prior thereto for the reason that these statutes if retrospective in scope, or applicable to then outstanding bonds, (a) require the raising of public funds for a private purpose contrary to Act VIII, Sec. 25 of the Michigan Constitution, (b) deny municipalities *and the taxpayers thereof* due process of law and equal protection of the laws and impair the obligation of contract contrary to the provisions of Article I, Sec. 10, Paragraph 1 of the Constitution and Article V and Article XIV, Sec. 1 of the Amendments to the Constitution of the United States of American and contrary to the provisions of Section 9 and 16 of Article II of the Constitution of Michigan."

Michigan Supreme Court Record, Pages 114 and 115.

Class Suit

This was a Class Suit brought on behalf of all taxpayers on property outside the Special Assessment District.

The amended Bill of Complaint states:

"That this suit is declared to be a representative suit, filed for the benefit of all persons not located within any of the special assessment districts created for the payment of the special assessment bonds hereinbefore described."

Sec. 21, page 7, Michigan Supreme Court Record

and the Opinion of the Trial Court stated:

"The parties to the suit represent three general interests. First, plaintiffs, who are individual taxpayers of the township who might be assessed for taxes to pay the refunding bonds; second, intervening defendant bondholders, who accepted refunding bonds in exchange for special assessment bonds

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which they had theretofore purchased; and, third, cross-defendant and intervening defendant municipalities, which may be liable to pay a pro rata share of the special assessment bonds or refunding bonds because of the acquisition of portions of the original township territory through annexation or incorporation."

Page 196, Michigan Supreme Court Record.

"There was a partial hearing of this case before another court in January, 1942, and the following is a statement of stipulated facts as shown by testimony taken at that time: * * * This suit is a representative suit filed for the benefit of all persons not located within any of the special assessment districts created for the payment of the special assessment bonds * * *."

Page 196 and 198, Michigan Supreme Court Record.

On appeal to the State Supreme Court the opinion of the Michigan Supreme Court stated:

"The parties in the trial court represented four general interests: The township of Royal Oak, individual taxpayers who might be assessed for taxes to pay the refunding bonds, bondholders who accepted refunding bonds in exchange for special assessment bonds, and municipalities which might be proportionately liable to pay a pro rata share of the bonds because of acquisition of portions of the township territory through annexation or incorporation."

Hazel Park Ass'n. v. Royal Oak Township, 317 Mich. 607.

Questions Raised and Passed Upon

The constitutional question of due process was raised by the amendment to the prayer of the Plaintiffs' Bill of Complaint which prayed:

> "That this Court may decree that Act 58 of 1927, Act 26 of 1931 and Act 271 of 1937 are invalid and inoperative as to bonds issued prior thereto for the reason that these statutes if retrospective in scope, or applicable to then outstanding bonds,
>
> (a) require the raising of public funds for a private purpose contrary to Act VIII, Sec. 25 of the Michigan Constitution,
>
> (b) deny municipalities *and the taxpayers* thereof due process of law and equal protection of the laws and impair the obligation of contract contrary to the provisions of Article I, Sec. 10, Paragraph 1 of the Constitution and Article V and Article XIV, Sec. 1 of the Amendments to the Constitution of the United States of America and contrary to the provisions of Section 9 and 16 of Article II of the Constitution of Michigan."
>
> Pages 114 and 115 of Michigan Supreme Court Record.

Same Questions Raised by Other Municipalities

This same constitutional question was raised by other defendant municipalities, Cities of Huntington Woods and Pleasant Ridge, by identical language:

> See Michigan Supreme Court Record, pages 116 and 117.

Thus, the same identical issue and constitutional question was presented by the appellants in this cause, namely, plaintiffs John G. Campbell, and Hazel Park Non-Partisan Taxpayers Association and Cross-plaintiffs, Cities of Huntington Woods and Pleasant Ridge.

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Plaintiff Campbell Represented Taxpayers as a Class

The plaintiffs John G. Campbell and Hazel Park Non-Partisan Taxpayers Association paid a retainer fee to the original attorney representing them, Harry Marx, who filed the pleadings on their behalf;

See Michigan Supreme Court Record, page 11.

Subsequently on April 15, 1942 before the trial of this cause, one Harold Street was substituted as attorney for the plaintiffs. By this time plaintiffs had run out of funds and were not able to finance further legal services. Further, the attorney Harold Street had entered the United States Army and subsequently the Federal Bureau of Investigation during the war, and this left the plaintiffs without legal counsel to represent them in this cause.

(See affidavit of Harold Street attached hereto, pages 37-38.)

No other attorney was substituted for the plaintiffs.

(See affidavit of John Campbell attached hereto page 34.)

Plaintiff Campbell Appeared at the Circuit Court Hearing on Behalf of the Class, But Without Legal Counsel

Mr. John G. Campbell was the only person appearing for or representing the taxpayers as a class on the date of hearing, for the reason there were no other officers available of the Hazel Park Non-Partisan Taxpayers Association, nor did that organization have any funds for such purpose. Thus, for all practical purposes Mr. John G. Campbell individually represented all taxpayers as a class.

(See affidavit, page 34.)

Plaintiff Present at the Trial

On the trial date, January 4, 1945, plaintiff John G. Campbell appeared in court, stated he was without counsel to represent him and that his attorney was in the service, and that he did not know what he should do about it. He was led to believe, by the attorneys present, that the taxpayers' rights and legal position would be fully cared for by the testimony and legal counsel of other interested parties, and that he need do nothing further to protect the taxpayers' interests, and that the taxpayers as a class would be fully represented and their rights protected by other parties. He did not know anything further was required of him or of the taxpayers as a class in order for their complaint to be fully heard and passed upon by the court. (See affidavit, page 34.) The settled case shows this to be true. Mr. Gillespie, attorney for the Township of Royal Oak, confirmed this by the following language in his opening statement:

> "Mr. Gillespie: I think, from what was said at the time this case was set for trial, the plaintiff will not be represented by counsel. I think we ought to set forth that at the previous hearing, when this case was set for trial, that the plaintiff John G. Campbell was in court and stated that he had no attorney and indicated that he was willing to let the case proceed without counsel representing the plaintiffs. * * *"
>
> Michigan Supreme Court Record, page 127.

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Plaintiff Present in Court—Not Defaulted

Mr. John G. Campbell was present in court. He was not defaulted. He was an active party to the contest although he was without counsel. (See affidavit, page 35.) The case was tried and appeal was subsequently taken by several municipalities, including the Cities of Huntington Woods and Pleasant Ridge on the same constitutional grounds which are now asserted in the United States Supreme Court. They are the identical grounds upon which the taxpayers relied in their Bill of Complaint.

No Notice to Plaintiffs of Settling or Filing Decree

Through some inadvertence of counsel Mr. Campbell received no copy of the Trial Court's Opinion, received no notice of settlement of the decree in the Trial Court and received no notice of presentation of settlement in the Trial Court, as required by Michigan Court Rule and Statute.

(See affidavit, page 35.)

Plaintiff Ignorant of Appellant Procedure to the Michigan Supreme Court

After the lower court decree was entered and appeal taken Mr. Campbell inquired of attorneys in the litigation as to the status of the case and was advised that the taxpayers rights were being fully protected and asserted on the appeal. He did not know about the need of filing a Claim of Appeal or Assignment of Errors or other similar appellant procedure. He believed that nothing further was required to be done on his part in order to protect and assert the taxpayers rights in said litigation.

(See Campbell affidavit, page 35.)

Filed No Claim of Appeal or Assignment of Errors—Advised Not Necessary

Plaintiff Campbell filed no Claim of Appeal or Assignment of Errors and was not represented by counsel on the appeal or before the Supreme Court cause. He was advised that their rights would be fully protected by the other appealing parties.

(See Campbell affidavit, page 35.)

Joined in Appeal to the United States Supreme Court

On learning of the decision of the Michigan Supreme Court, Mr. Campbell discussed the matter with the counsel for the appellants, Cities of Pleasant Ridge and Huntington Woods and for the first time learned that he should join in the appeal if the appeal was to be taken. Here he was for the first time advised that his name should be added to appellant papers and therefore a substitution of attorneys was obtained and an appeal sought and granted on his behalf jointly with other appellants.

Good Faith Representative of Taxpayers

As a Class

Plaintiff, John G. Campbell, has at all times been the proper representative of the taxpayers as a Class. He has acted in good faith. The law and facts relative to the taxpayers' position has been fully shown in evidence, argued and briefed by counsel, and passed upon by both courts. Any action which he might have taken by way of filing a Claim of Appeal or Assignment of Errors would have added nothing to the procedure or the results obtained.

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Motion to Dismiss

The appellee, Township of Royal Oak, has moved to dismiss the appeal because plaintiff on behalf of the taxpayers as a Class did not perform the technical requirement of filing a Claim of Appeal and Assignment of Errors on the appeal from the Circuit Court to the State Supreme Court. It is urged by the appellee, Township of Royal Oak, that the rights of thousands of taxpayers represented by plaintiff as a Class, are thus to be lost.

APPELLANTS' CONTENTION
(Summary of Argument)

The appellants assert, on behalf of the Appeal by Hazel Park Non-Partisan Taxpayers Association and John G. Campbell, representative of taxpayers as a Class, that:

1. An appeal will not be dismissed for defects in procedure which are not known to parties who are not represented by Counsel.

2. Assignments of Error on an appeal to an intermediary court are not necessary prerequisites to a subsequent appeal when the intermediary court fully passes upon the constitutional questions involved.

3. An appeal should be allowed to representative parties acting on behalf of a Class, in a Class Suit litigation, wherever justice requires that the rights of such Class be protected by appeal.

4. Appeal in equity cases are heard *de novo* in the appellate court and decisions which affect parties jointly interested or having community of interests apply to and for the benefit of both the appealing and non-appealing parties.

Appellants contend on behalf of the appeal by the Cities of Huntington Woods and Pleasant Ridge that:

5. Municipalities being recognized by Michigan law as proper representatives in court proceedings for their taxpayers, are proper interested parties to appeal and raise constitutional questions on behalf of such taxpayers.

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ARGUMENT OF LAW

I.

Appellants contend:

I. **APPEALS WILL NOT BE DISMISSED FOR DEFECTS IN PROCEDURE WHICH ARE NOT KNOWN TO PARTIES NOT REPRESENTED BY COUNSEL.**

"Questions not raised in the trial court have been considered on appeal or review in some instances upon the ground that the failure to raise such question below was, under the particular circumstances, excusable, as, for example, where the accused in a criminal case, conducting his own defense, failed to make a motion for a new trial until after judgment, due to his ignorance of the rule requiring that such a motion be made before judgment."

3 Am. Jur. 39;
Stecher v. State, 202 Wis. 25, 231 N. W. 168, 70 A. L. R. 203.

II.

Appellants contend:

II. **ASSIGNMENTS OF ERROR ON APPEAL TO AN INTERMEDIARY COURT ARE NOT NECESSARY PREREQUISITES TO A SUBSEQUENT APPEAL WHERE THE INTERMEDIARY COURT FULLY PASSED UPON THE CONSTITUTIONAL QUESTION INVOLVED.**

While assignments of error may be necessary as a general rule, still in equity they may not be necessary.

Wernik v. Collins, 234 Mich. 224, 207 N. W. 842.

An appellate court may consider plain errors or fundamental or serious errors apparent on the face of the record, even though they have not been properly assigned.

4 C. J. S. 1735;
University Indemnity Co. v. Tenery, 39 P. 2d 776;
Baker v. Denver Co., 210 P. 845, 72 Colo. 233.

Even though the pleadings do not raise a constitutional question, if the trial or appellate court expressly passes upon the question, the one aggrieved thereby may appeal from such ruling on the constitutional ground.

> "The general rule that an appellate court does not give consideration to issues not raised below should not be applied where the obvious result would be a plain miscarriage of justice."
>
> *Hormel v. Helvering*, 312 U. S. 552, 85 L. Ed. 1037

III.

Appellants contend:

III. APPEALS SHOULD BE ALLOWED FOR PARTIES ACTING ON BEHALF OF A CLASS IN A CLASS SUIT LITIGATION WHENEVER JUSTICE REQUIRES THAT THE RIGHTS OF SUCH CLASS BE PROTECTED BY APPEAL.

Class Suits Must Have Fair Representation

> "In cases to which the doctrine of representation applies, and one or a few parties are permitted to sue and defend on behalf of many, care must be taken that a party or parties to the record fairly represent the interest or right involved, so that it may be full and honestly tried. * * *"
>
> *39 Am. Jur.* 922;

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United States v. Old Settlers, 148 U. S. 427, 37 L. ed. 509, 13 S. Ct. 650;
Smith v. Swormstedt, 16 How. (U. S.) 288, 14 L. ed. 942.

Must Be Prosecuted With Diligence

Those voluntarily assuming the duty to prosecute a class suit are legally and equitably bound faithfully and honestly to discharge such duty.

39 Am. Jur. 928;
Kelly v. W. C. Turnbow Petroleum Corp., 137 S. W. 2d 216.

Members of a class, not present in court, may be bound by the judgment of the court only where they are in fact adequately represented by parties who are present, and provided that the procedure is so devised and applied as to insure that those present are of the same class as those absent,

"and that the litigation is so conducted as to insure the *full and fair consideration of the common issue.*"

In *Hansberry v. Lee,* 85 L. ed. 22, 311 U. S. 32, 132 A. L. R. 741.

In the case of, *Kelly v. Turnbow Corp.,* 137 S. W. 2d 216 the court said,

"• • • Those so voluntarily assuming the duty to prosecute such a class suit *are legally and equitably* bound to faithfully and honestly discharge such duty."

And, they must prosecute in good faith with vigor and reasonable capacity,

Hallett v. Moore, 185 N. E. 478.

It can hardly be called fair representation or a suit prosecuted with diligence if the technical appellate rules are to be used to foil the efforts of the representative.

Justice demands that the class be protected against mistakes or errors made in good faith by their representatives particularly where they have not prejudiced any party.

Here the representative of the class was without counsel,

See Campbell affidavit, pages 34-35.

and did not know of the appellate requirements, nor did the court or counsel advise him.

See Campbell affidavit, pages 34-35.

in good faith he believed he was doing everything necessary to represent the taxpayers as a class,

See Campbell affidavit, pages 34-35.

The obvious truth, therefore was that the court felt that taxpayers rights were fully protected. Thus, it would be a miscarriage of justice to now hold that taxpayers as a class are excluded from appellate rights primarily because the court neglected to protect their rights through the technical error of the representative.

The duty of appeal rests upon the representative of the class, not only to appeal, but also to defend or prosecute the appeal,

Vanderburg County v. Sanders, 30 N. E. 2d 713, 131 A. L. R. 1048

where injustice would result.

In, *Fleming County v. Plummer* (1930) 31 S. W. 2d 897, 235 Ky. 506 in discussing the question of dismissal of a class suit it was said,

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"This rule has some qualifications, and limitations when the suit has been brought by the plaintiff in a representative capacity. * * * suit will not be dismissed if the substantial rights of other parties have accrued and injustice will be done them by permitting the discontinuance, and it usually requires that bad faith or collusive action be shown."

See also *91 A. L. R.* 587.

IV.

IV. APPEALS IN EQUITY CASES ARE HEARD DE NOVO IN THE APPELLATE COURT AND DECISIONS WHICH AFFECT PARTIES JOINTLY INTERESTED OR HAVING COMMUNITY OF INTERESTS INURE TO AND FOR THE BENEFIT OF BOTH THE APPEALING AND NON-APPEALING PARTIES.

Equity Appeals De Novo

Equity appeals are heard *de novo* under Michigan law,

Sipes v. McGhee, 313 Mich. 614, 25 N. W. 2d 166;
Todd v. Ratz, 313 Mich. 111, 20 N. W. 2d 830.

Decisions Affecting Parties With Community or Joint Interest

When parties have a joint interest or an interest in common the decision, on appeal of one, will likewise affect and inure to the benefit of the other.

In the case of, *King v. Emmons,* 823 Mich. 116 a bill was filed by a guardian ad litem appointed by the Probate Court seeking a receiver and other relief in the Circuit Court. The defendants both moved to dismiss and on denial of the motions the defendant Cummings Foundation appealed to the Supreme Court (the defendant Emmons not appealing), and the Supreme Court vacated

the order which appointed the receiver and granted injunctive relief without prejudice on the ground that the guardian ad litem could only be appointed in the Circuit Court.

The Court said:

> "Notwithstanding defendant Emmons did not appeal from the Circuit Court's denial of his motion to dismiss, since it has now been determined that Mr. King is not a proper party plaintiff in this suit, the order of dismissal should be operative in favor of both defendants."

In the case of, *Haeft v. Kock*, 171 Mich. 564 a judgment was secured against joint defendants, and a part of them appealed, others not appealing. It was held that when the judgment was reversed the entire cause must be tried again *de novo*. As to the other defendants who defaulted and suffered judgment to be entered against them, the Court said:

> "• • • While it has been recognized as a general rule that only the rights of the parties before the court can be adjudicated on appeal, it has, nevertheless, been held that where the parties appealing and those not appealing stand upon the same ground, and their rights are involved in the same question and equally affected by the same judgment, the court will consider the whole case and settle the rights of all parties even though defendants not appealing are in default.
>
> *Wood v. Cullen*, 13 Minn. 394 (Gil. 365);
> *Alling v. Wenzel*, 133 Ill. 264 (24 N. E. 551);
> *Tompkins v. Wiltberger*, 56 Ill. 385;
> *Mohr v. McKenzie*, 60 Ill. App. 575;
> *Bradford v. Taylor*, 64 Tex. 169."

The very municipalities, Huntington Woods and Pleasant Ridge, which did fully follow appellate procedure to the state Supreme Court are actually morally bound to represent their taxpayers.

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It would be wise and judicious to hold that in asserting the identical contention of the taxpayers as a Class they thereby become at least temporarily the class representative.

One who owes a duty to the Class for whose benefit the action is maintained is a proper representative of the Class,

47 C. J. 47;
Whitmore v. New York Co., 158 App. Div. 178, 142 N. Y. S. 1098.

It was the duty of the trial court to guard the rights of the taxpayers as a Class to the extent of making sure they were being vigorously and fairly represented. The court was bound to take control from the representative if he failed in this regard.

39 Am. Jur. 928;
91 A. L. R. 590.

We therefore contend that plaintiff's appeal is properly before the Supreme Court of the United States because:

1. An appeal will not be dismissed for defects in procedure which are not known to parties who are not represented by Counsel.

2. Assignments of Error on an appeal to an intermediary court are not necessary prerequisites to a subsequent appeal when the intermediary court fully passes upon the constitutional questions involved.

3. An appeal should be allowed to representative parties acting on behalf of a Class, in Class Suit litigation, wherever justice requires that the rights of such Class be protected by appeal.

4. Appeals in equity cases are heard *de novo* in the appellate court and decisions which affect parties jointly interested or having community of interest apply to and for the benefit of both the appealing and non-appealing parties.

Supporting Affidavits

Attached hereto as exhibits are supporting affidavits of John G. Campbell, plaintiff in this cause and Harold Street, one time attorney for plaintiff affirming all facts set forth in this statement which are not of record in this cause. See pages 33 to 38. The originals have been filed with the clerk of this Court.

V.

Appellants contend:

V. MUNICIPALITIES BEING RECOGNIZED BY MICHIGAN LAW AS PROPER REPRESENTATIVES IN COURT PROCEEDINGS FOR THEIR TAXPAYERS, ARE PROPER INTERESTED PARTIES TO APPEAL AND RAISE CONSTITUTIONAL QUESTIONS ON BEHALF OF SUCH TAXPAYERS.

Question at Issue

The real question at issue in this case must be kept in mind, namely as we contend,

> *"• • • It is a denial of due process to tax for private purposes—viz., a gift to bondholders."*

Opposing counsel have moved to dismiss our appeal, contending that the municipalities, Pleasant Ridge and Huntington Woods, cannot raise the "due process" question.

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The cases cited by opposing counsel hold that,

> "• • • the power of the State to control its own governmental agencies and political subdivisions is unrestrained by the requirements of due process of law, and since the requirement is a limitation upon the State itself, it is not available to the State or its agencies or political subdivisions, *16 C. J. S.*, p. 1158."

Municipality May Raise Constitutional Questions on Behalf of the Taxpayers

But these cases cited by counsel *do not hold that the municipality may not raise the question on behalf of its taxpayers.* To the contrary, even when a constitutional question may not be raised on behalf of the municipality as an entity, it nevertheless may raise the question on behalf of its taxpayers. Thus in the case of,

> *Board of Education Lincoln Park v. Board of Education City Detroit*, 245 Mich. 411.

the Michigan Supreme Court held that a school district might raise the constitutional question of impairment of contract on behalf of the taxpayers and bondholders even though the municipality derived no protection from the constitutional provision.

Again in the Michigan case of, *City of Saginaw v. Consumers Power Company*, 213 Mich. 460 the Michigan Supreme Court held that the City of Saginaw had the right to maintain a suit for the relief of its inhabitants against unlawful lighting rates even though it had no direct interest in the case.

It is a prerogative of each State to determine who may be a proper party plaintiff litigant, and thus it appears that the Michigan cases have clearly permitted a

municipality to raise a constitutional question for the protection of its taxpayers. An aggrieved municipality may appeal, *City of Savannah v. Jesup*, 106 N. S. 563, 27 L. ed. 276 for one in a representative capacity has an interest justifying an appeal, *Hassall v. Wilcox*, 115 U. S. 598, 29 L. ed. 504.

In the case of *Board of Education Lincoln Park v. Board of Education Detroit*, 245 Mich. 411, *supra*, the Michigan Supreme Court permitted these two municipalities to raise constitutional questions solely for the benefit of bondholders and taxpayers saying as follows:

> "While the legislature possesses the power to detach a part of the territory from one school district and attach it to another, and may 'apportion the common property and the common burdens in such manner as to them may seem reasonable and equitable' (*Kies v. Lowrey*, 199 U. S. 233, 240 (260 Sup. Ct. 27)), it may not impair the obligation in the bondholders' contract by taking such action without making provision for the payment thereof.
>
> "It is suggested that the bondholder alone may raise the question here considered. The plaintiff has paid the interest on these bonds, and here seeks to compel payment by the defendant. It may hereafter decline to make such payment and of the principal debt when it falls due. The remedy of the bondholder would be as above stated. In our opinion it would not only be unjust to require the bondholder to be put to the expense of such action when its rights can be fully determined in the proceeding before us, but also unjust to the plaintiff to require it to make default in payment and be subjected to the expense incident to such a proceeding."

In the case of *City of Saginaw v. Consumers Power Company*, 213 Mich. 460, the Michigan Supreme Court permitted the City of Saginaw to maintain a suit to pre-

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vent illegal lighting charges, as the representative of its inhabitants and said:

> "We have thus far under this head considered the rights of the city as a consumer of commercial light and power. We have reached the conclusion that it may not as such consumer of commercial light and power maintain this bill for the specific performance of a contract by the terms of which it is not bound. By the bill no question of discrimination is raised and relief is solely sought by virtue of the contract. The contract being an unenforceable one, the city as an entity, as a consumer of power, is without relief by way of specific performance on the facts stated in the bill.
>
> "But it does not follow that the city may not maintain this bill on behalf of the public, on behalf of its citizens, on behalf of the consumers of commercial light and power. We have already pointed out that contracts for private commercial lighting and power do not fall within the inhibition of section 3427, 1 Comp. Laws 1915, and that the contract was a valid and enforceable one so far as it relates to the inhabitants of the city. Because the city is not entitled to all the relief it asks it does not follow that it is not entitled to any. Upon a motion to dismiss, the bill should be sustained if any ground for equitable relief is stated, even though imperfectly. *Watson v. Wagner*, 202 Mich. 397; *Dewey v. City of Flint*, 205 Mich. 195. We think the city as representative of its inhabitants may maintain this bill in their behalf and thus avoid a multiplicity of suits. In *Muncie Natural Gas Co. v. City of Muncie*, 160 Ind. 97 (66 N. E. 436, 60 L. R. A. 822), the court, speaking through Mr. Justice Gillett, said:
>
> " 'As applied to this case, it is a matter of public expediency that by one suit rights shall be established for the time that the injunction has to run, instead of hundreds of the inhabitants of the city being each compelled to sue to vindicate his right, or

otherwise to submit to a small but annoying injustice.' "

Thus the doctrine of Michigan is clearly established that a municipality may raise constitutional questions on behalf of its inhabitants and taxpayers.

Representative Suits Are Necessary to Justice

Though political subdivisions are merely creatures of the Legislature, they still are operated for the benefit of their constituents. So too unconstitutional laws operating against municipalities generally penetrate through the municipality so that the taxpayers are the parties actually injured.

It would indeed be a denial of justice and a contradiction of our representative form of government to hold that a municipality might not represent its people in a case such as this. Only one citizen in a thousand is financially able to pay the legal fees and costs of an appeal upon constitutional grounds to the United States Supreme Court. It might be urgent that a group of taxpayers can be organized to carry on such litigation. But no such "group action" will be taken unless a large group of taxpayers can first be organized by the hard work and ingenuity of the organizer, so as to each contribute something toward the legal expense. Who is to do this thing? Not a lawyer, for he would then be accused of soliciting business and breach of ethics. Not a lay person, because he would generally be unversed in the intricacies of constitutional law. Further, taxpayers cannot even enter into so-called "class suits" in most instances, for in such case someone still must put up the money for the litigation and there is no way of providing the cost of a taxpayer's class suit out of the "*res.*"

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The simple truth is, if we want the question to stand honest surveillance, unshielded by the prosaic legal doctrine that,

> "only one injured by unconstitutionality may complain"

such unconstitutional injustices would not otherwise be raised in the vast majority of cases because there is no one to fight the battle of the ordinary taxpayer.

Thus *taxpayers rights* in this day and age *must be protected by their servant and representative, the municipality itself.*

To deny this is to limit the service of municipalities to their taxpayers to the legislative and executive functions of government and leave them helpless in this feature of judicial protection.

To follow opposing counsels reasoning, a municipality cannot object, but must supinely levy, collect, and disburse taxes for all manner of private and unlawful purposes. This is indeed oppression by antiquated legal doctrination.

This would be a farce and a mockery of due process guarantees. It is the very type of illustration used by those who would destroy one capitalistic system. To protect American Democracy we must be ever vigilant to guarantee simplicity and facility of access and hearing before our courts. It is not enough to provide a "right to a hearing" if that right is actually denied by prohibitive cost, ponderous procedure, or the pitfalls of technicality.

Appellant Municipalities Being the Instrumentalities Enforcing the Unconstitutional Statutes Should Therefore Be Permitted to Raise the Constitutional Question for the Benefit of Their Taxpayers

If appellant municipalities are denied the right of appeal and the decision of the Supreme Court of Michigan in the case at bar is sustained, appellant municipalities will be required to advance funds to pay the bonds in question and to assess their taxpayers at large to pay for the bonds. Thus these municipalities will be the agencies perpetrating unconstitutional taxation. Subsequently taxpayers if their rights are not determined herein, may re-litigate this matter and enjoin such tax collection. The cities, appellant, are therefore in the position of a ministerial officer, who must be permitted to raise a constitutional question because otherwise he will be injured by, or liable for his own actions in enforcing the unconstitutional statute.

See, *11 American Jurisprudence* 763.

Decisions in Other Jurisdictions

Numerous decisions in other jurisdictions sustain the same doctrine.

Representative Action for Inhabitants

> "In many instances, a municipal corporation may bring a representative action in behalf of its inhabitants to protect, preserve, or establish a common right. Among other results of such practice, a multiplicity of suits is avoided. Where such an action is brought, it is not brought by the common council as such, for the members of that body merely represent the municipality. The municipal corporation sues, and it is composed of the inhabitants of the locality.

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Thus, a municipality has authority to file a bill to restrain a breach of a contract for the furnishing of utility service under specified terms, notwithstanding its inhabitants or citizens can redress the wrong individually or collectively, and is a proper party in proceedings to require a public service company to continue the performance of its public service in a reasonably adequate manner for the benefit of the municipality and its inhabitants. Such an action is not to recover loss or injury suffered by an individual, but is brought by the municipality, representing the inhabitants, to prevent a possible loss or inconvenience to them by a noncompliance on the part of the utility company with the contract made by it with the municipal corporation. In a similar type of action involving the identical interest of many inhabitants of a municipal corporation, the municipality is a proper party to be made defendant in the suit as representative of all interested."

38 American Jurisprudence 424.

"A municipal corporation has the authority, in behalf of the people, to maintain an action for the purpose of preserving the rights of the general public in, and to the use of, public property and premises. Similarly, in such a case, where the municipality is a defendant, it is the representative of the public. Under particular statutory provisions, it has been held that a municipality may maintain an action for the benefit of individuals injured by the breach of a contract for the construction of a public improvement."

38 American Jurisprudence 424.

"Under many circumstances, a municipal corporation may maintain actions as the representative of its inhabitants or citizens. There is little authority dealing with the question whether an action by a municipality is a bar to an action by citizens of the

> municipality involving the same matter. The position has been taken that where there is a suit already pending on behalf of a municipality concerning a matter of general interest to all citizens, a subsequent suit against the same defendant brought by individual citizens of the municipality in respect of the same subject matter will be barred by the pending suit. Such holding is based upon the analogous rule of *res judicata.*"
>
> *38 American Jurisprudence* 414-5.

In *First Const. Co. of Brooklyn v. State of New York,* (New York Court of Appeal) 116 N. E. 120, it was held that where the Plaintiff sought to make the State pay for rights acquired in real property claimed to have been obtained from or through Legislative enactments, the State may defend on the ground the laws are unconstitutional.

In the case of *State v. Walmsley* (Louisiana 1935), 160 So. 91, it was held that the State and Attorney General have sufficient interest in constitutionality of a statute amending and re-enacting the statute establishing a sewerage and water board for New Orleans and defining its powers to bring suit attacking the constitutionality of a statute where the ability of the state to market its obligations and those of its agencies with agencies of federal government, such as Public Works Administration, had been affected by statute, and phases of public health and employment of citizens of city and state were dependent upon determination of constitutionality and scope of statute (Act No. 36 of 1934, 2d Ex. Sess.).

The decision reads in part,

> "This is a suit by the state, and by the Attorney General, in his official capacity, he being charged with the duty of representing the state in all judicial proceedings in which the state has an interest, either as plaintiff, defendant, or intervener.

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> It is alleged by the plaintiffs that Act No. 36 of the Second Extra Session of the Legislature, approved November 21, 1934, is unconstitutional, null and void for the six reasons enumerated in article 13 of the petition; that if the provisions of said act are complied with, irreparable injury will be done to the state, the city of New Orleans, the property taxpayers of said city, and to certain of its bondholders; and that the several officers and boards mentioned in article 15 of the petition will comply with the provisions of said act, unless enjoined and restrained from so doing.
>
> For the foregoing reasons, there is no doubt in my mind that the Attorney General possesses the power and authority to file this suit."

In *Davis v. McCasland* (Oklahoma 1938), 75 Pac. (2d) 1118, the syllabus by the court states,

> "A city in its capacity as trustee for all interested bondholders of a paving district may question the constitutionality of an act affecting the rights of such bondholders, and neither it nor its officers acting for it in such capacity can be compelled by an unconstitutional law to act prejudicially to such bondholders."

The case states,

> "J. C. McCasland, owner of property in a paving district in the city of Duncan, purchased some paving bonds and tendered them to the city clerk in payment of his paving assessments as permitted by chapter 58, Session Laws 1933, 62 Okl. St. Ann., pars. 341-346. Upon refusal of the clerk to accept the bonds, McCasland brought suit in mandamus against the clerk and the city, and the district court awarded him full relief. The city clerk and the city appeal, alleging the unconstitutionality of the 1933 law.

"McCasland contends that neither the city nor the clerk can raise the constitutional questions involved. This contention, if sound, disposes of this case and leaves the constitutional questions for a proper case.

"The general rule, of course, is that a party without a personal interest in a matter cannot question the constitutionality of an act involving such matter, nor can one who is not a party to a contract assert that an act of the Legislature impairs the validity of such contract. Has the city such an interest?

"The city in its capacity and duties under a paving bond contract has been termed 'trustee for all the interested bondholders,' *Service Feed Co. v. City of Ardmore,* 171 Okla. 155, 42 P. 2d 853, 857; and the trustee of an express trust, *Straughn v. Berry,* 179 Okl. 364, 65 P. 2d 1203. It is apparent, therefore, that the city had a duty to perform that was not purely ministerial as well as an interest in the results of the collections. It has been held that the trustee of an express trust is not estopped from setting up in his character as trustee any defense which the *cestui que trustent,* were they in person defending the action, might properly urge in their own behalf. *Wagnon v. Pease,* 104 Ga. 417, 30 S. E. 895. See *Producers' State Bank of Wilson v. Clark,* 102 Okl. 181, 228 P. 986. We conclude, therefore, that the city has such interest, both in its own right and as trustee, to enable it to raise the constitutional questions involved, that is, whether or not the act of 1933, *supra,* violates section 15, article 2, of the Oklahoma Constitution, and section 10, article 1, of the Constitution of the United States."

In *Simmons v. Ericson* (S. D. 1929), 223 N. W. 342, plaintiff as land owners within a school district *outside* municipal boundaries brought an action to restrain the spreading of taxes. The school district intervened alleging unconstitutionality of a state statute on the ground it authorized a discriminatory and non-uniform tax.

The decision states,

> "We think the placing of agricultural lands within the school district in a different class than that of other real estate is not based on differences in the character of the property which furnish a reasonable ground for making a distinction between the two classes, and that it really results in permitting agricultural land to escape a burden imposed on other real estate situated in substantially similar circumstances and conditions.
>
> "Appellant contends that respondent is not in a position to raise the constitutional question in this case because the 10-mill levy on agricultural lands and the 25-mill levy on other property within the district would raise sufficient funds for the current running expenses of the district in addition to the amount required for the bond interest and sinking fund, and for that reason the school district is not in a position to claim that the law is unconstitutional, but this argument overlooks the fact that none of the owners of nonagricultural property are parties to the action and therefore they cannot be bound by the judgment. If, as we hold, the law is unconstitutional as imposing a higher rate of taxation upon them than upon owners of agricultural property within the district, then they would be in a position to resist the levy of 26.52 mills on their property, on the ground that it was excessive as to them, in which event respondent would be deprived of the revenue necessary to meet its current expenses. *It cannot, therefore, be said that respondent has not such an interest in the result of this case as entitles it to raise the question of the constitutionality of the act.*"

In *State v. Doane* (Kansas), 159 P. 38, the state brought a mandamus action to test the constitutionality of one of its election laws.

The decision states,

> "The state is a proper party—indeed, the proper party—to bring this action. The state is always interested where the integrity of its Constitution or statutes is involved.
>
> 'It has an interest in seeing that the will of the Legislature is not disregarded, and need not, as an individual plaintiff must, show grounds of fearing more specific injury. *State v. Kansas City*, 60 Kan. 518 (57 Pac. 118).' *State v. Lawrence*, 80 Kan. 707, 103 Pac. 839.
>
> Where the constitutionality of a statute is in doubt the state's law officer, its Attorney General, or county attorney, may exercise his best judgment as to what sort of action he will bring to have the matter determined, either by *quo warranto* to challenge its validity (*State v. Johnson*, 61 Kan. 803, 60 Pac. 1068, 49 L. R. A. 662) by mandamus to compel obedience to its terms (*State v. Dolley*, 82 Kan. 533, 108 Pac. 846), or by injunction to restrain proceedings under its questionable provisions (*State ex rel. v. City of Neodesha*, 3 Kan. App. 319, 45 Pac. 122)."

Respectfully submitted,

STANTON G. DONDERO,
Attorney for Appellants, Hazel Park Non-Partisan Taxpayers Association, John G. Campbell, Cities of Pleasant Ridge and Huntington Woods,
521 Washington Square Bldg.,
Royal Oak, Michigan,
ARTHUR E. MOORE,
Of Counsel,
521 Washington Square Bldg.,
Royal Oak, Michigan.

Dated: October 27, 1947.

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AFFIDAVIT OF JOHN G. CAMPBELL IN SUPPORT OF BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS APPEAL

(Title of Court and Cause)

State of Michigan,
County of Wayne—ss.

Now comes John G. Campbell being first duly sworn deposes and says:

1. That he is the plaintiff in the above entitled cause and was the President of the co-plaintiff Hazel Park Non-Partisan Taxpayers Association at the time of the filing of the Bill of Complaint in said cause.

2. Deponent further states that he makes this affidavit in support of the Brief of appellants in opposition to motion to dismiss appeal.

3. Deponent further states that said cause of action was filed by said plaintiff as a Class Suit on behalf of themselves, and all other property owners who own property lying outside of the Special Assessment Districts in question, seeking injunctive relief prohibiting the levying of taxes for the payment of Special Assessment Bonds in question, against properties lying outside of the Special Assessment Districts.

4. Deponent further states that throughout the litigation in this cause plaintiffs were recognized and treated as the representatives of said taxpayers as a class.

5. Deponent further states that he voluntarily entered upon the duty of representing said class of taxpayers and did to the best of his ability pursue said litigation with

diligence and attempted to protect and enforce the rights of said class.

6. Deponent further states that the original Bill of Complaint was prepared for plaintiffs and filed by one Harry Marx, attorney of Detroit, Michigan, who was paid a retainer fee for such service. Subsequently on April 15, 1942, prior to the trial in this cause in the Circuit Court one Harold Street, an attorney of Detroit, Michigan, was substituted as plaintiffs' counsel.

7. By this time plaintiffs were without funds with which to finance said litigation and were not able to pay further legal fees.

8. That said Harold Street entered the United States Army and subsequently the Federal Bureau of Investigation during the World War, so that at the time the said cause of action came on for trial, plaintiffs were without legal counsel to represent them in said cause, and plaintiffs were unable to secure other counsel therefor.

9. At the opening of the hearing in said cause in the Circuit Court your affiant, Mr. John G. Campbell, was the only person appearing for or representing the taxpayers as a class, for the reason there was no other officer of the Hazel Park Non-Partisan Taxpayers Association available; and for the further reason that neither said association nor your deponent had funds with which to hire another attorney.

10. On the trial date, January 4, 1945, plaintiff, John G. Campbell, appearing in court stated that he was without counsel to represent him and that his attorney was in the Armed Service and that he did not know what he should do about it. He was led to believe by the attorneys present that the rights of said taxpayers as a class would

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be protected and their legal position cared for by testimony and other counsel interested in said cause, and that he need do nothing further to protect the interests of said taxpayers as a class, and that they would be fully represented and their rights fully protected by other parties. He did not know anything further was required of him or the taxpayers as a class in order for their complaint to be fully heard and passed upon by the court.

11. Neither Mr. John G. Campbell or the Hazel Park Non-Paristan Taxpayers Association were dismissed, defaulted or otherwise removed from active participation in said litigation. Mr. Campbell was present in court at said trial, but he was not represented by counsel.

12. Deponent further states that neither he nor the Hazel Park Non-Partisan Taxpayers Association received any copy of the Opinion of the Trial Court, any notice of settlement of the decree in the Trial Court, or any notice of presentation of decree for settlement as required by the rules and practices of said court and the statute in such case made and provided.

13. After the lower court decree was entered and after an appeal was taken to the Supreme Court of the state, deponent inquired of attorneys in the litigation as to the status of the case and was advised that the taxpayers' rights were being fully protected and asserted on the appeal.

14. Deponent is a lay person untrained in the law and did not know anything concerning the manner in which appeals are take, nor did he know of the need of filing of a Claim of Appeal or Assignment of Errors or other appellant procedure. Deponent believed that nothing further was required to be done on his part in order to protect and assert the rights of the taxpayers existing as a class in said litigation.

15. On learning of the decision in the Michigan Supreme Court Mr. Campbell discussed the matter with Arthur E. Moore, counsel for the appellants, Cities of Pleasant Ridge and Huntington Woods, and for the first time learned of the necessity of joining in an appeal and of appellant procedure pertaining thereto. Here for the first time deponent was advised that his name should be added to appeal papers. Therefore, he obtained and secured a substitution of attorneys so that an appeal might be brought in this matter to the United States Supreme Court on his behalf, as representative of the Hazel Park Non-Partisan Taxpayers as a class.

John G. Campbell.

Subscribed and sworn to before me a Notary Public, in and for the County of Wayne, on this 18th day of October, 1947.

James B. Chaney,
Notary Public, Wayne County, Michigan.
My Commissioner expires November 5, 1948.

(Notarial Seal)

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AFFIDAVIT OF HAROLD STREET IN SUPPORT OF BRIEF OF APPELLANTS IN OPPOSITION OF MOTION TO DISMISS

(Title of Court and Cause)

State of Michigan,
County of Muskegon—ss.

Now comes Harold Street, being first duly sworn, deposes and says:

1. He is a practicing attorney, duly authorized to practice law in the State of Michigan, with offices presently in Muskegon, Michigan.

2. Deponent further states that on or about the 15th day of April 1942 he was substituted as attorney for the plaintiffs in the above entitled cause and did thereafter represent the plaintiffs, John G. Campbell and the Hazel Park Non-Partisan Taxpayers Association.

3. Deponent further states that on or about the 20th day of July, 1942 he entered the Federal Bureau of Investigation and that thereafter throughout continuance of such service, until after the termination of the last World War was unable to engage in the practice of law in any litigation whatsoever.

4. That by virtue of the premises he was unable to represent the plaintiffs John G. Campbell and Hazel Park Non-Partisan Taxpayers Association, at the hearing in the Circuit Court on January 4, 1945 or thereabouts, but that he was advised and led to believe that other counsel would be substituted in his stead or that the court would assist the plaintiffs in their own proper person, without counsel, in representing taxpayers as a class and in prop-

erly prosecuting said litigation with vigor and reasonable capacity.

5. Deponent further states that he executed this affidavit in support of the brief of appellants in the above entitled cause in opposition to the motion to dismiss appeal.

Harold M. Street.

Subscribed and sworn to before me a Notary Public in Muskegon County, Michigan, on this 13th day of October, 1947.

Harriet D. Neitring,
Notary Public, Muskegon County, Michigan.
My commission expires December 10, 1949.

(Seal)